Supreme Court, U.S.
FILED
JUN 9 2001
CLERK

No. 00-1876

In The

Supreme Court of the United States

THE CITIZENS BANK OF WESTON, INC.,

Petitioner,

v.

THE CITY OF WESTON,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF IN OPPOSITION

MICHAEL CLAY SMITH*
MARGARET D. SMITH
SMITH & SMITH
518 Center Avenue
Weston, WV 26452
(304) 269-5847
**Counsel of Record*
Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Respondent is dissatisfied with the Petitioner's statement of the question presented. We believe it better stated thusly:

Is a hometown bank that reports all of its revenue from the banking activities that it does in the City of Weston deprived of equal protection of the laws by a facially non-discriminatory city tax on business revenue simply because other banks operating in the city are branches of large multi-city banks and these branches: (1) "ship out" of town to their home offices or other affiliates some of the banking business that originates within their Weston offices; (2) leave that business permanently to be handled by the offices elsewhere; and (3) thus do not pay the city tax on ensuing revenues from that business done elsewhere?

TABLE OF CONTENTS

Page

Question Presented i

Statement of the Case 1

Argument: Reasons for Denying the Writ 3

There is No Governmental Action 3

The Case is Not "Ripe" 4

Washington v. Davis Was Appropriate 6

The West Virginia Court Properly Interpreted *Allegheny-Pittsburgh* 8

Long Island Lighting Does Not Conflict 10

Anyway, How Could We Fix It? 11

Summary of the Argument 11

Conclusion 12

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Allegheny-Pittsburgh Coal Co. v. County Commission of Webster County, 488 U.S. 336 (1989) 8, 9

Board of Trustees of the University of Alabama v. Garrett, 121 S.Ct. 955 (2001) 8

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 6

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 8

Liverpool, N. Y. & P. S. S. Co. v. Emigration Commissioners, 113 U.S. 33 (1885) 5

Long Island Lighting Company v. Town of Brookhaven, 889 F.2d 428 (2nd Cir. 1989) 10

New Orleans v. Dukes, 472 U.S. 297 (1976) 7

Nordlinger v. Hahn, 505 U.S. 1 (1992) 8

United Public Workers v. Mitchell, 330 U.S. 75 (1947) 5

Washington v. Davis, 426 U.S. 229 (1979) 6, 10

STATE CASE

Burnsville v. Kwik-Pic, Inc., 185 W.Va. 696, 408 S.E.2d 646 (1991) 7

STATEMENT OF THE CASE

The Respondent believes that this case is far simpler than portrayed in the Petition, and that a crisp understanding of the facts is crucial. At this juncture, we will talk more about the facts than the law.

1. **The Context.** This is a bout in the brawl between conventional hometown banking and modern branch banking.

2. **The Tax.** In 1997 Weston joined 148 other West Virginia cities by enacting a Business and Occupation ("B&O") tax, which is a tax on gross revenues from business done within the city limits. Much like a sales tax, B&O taxes have been used for many years by almost all West Virginia cities and towns because West Virginia law does not permit municipalities to impose local sales or income taxes.

Banking is one of the activities that may be taxed by municipalities under the state B&O tax enabling statute, and Weston's B&O tax does so. The Weston banking tax ordinance is absolutely facially neutral vis-à-vis hometown versus branch banks; it simply places a tax of 0.75% upon "the business of banking or financial business . . . " (The Weston banking tax ordinance appears in the bank's Petition at pp. 2-3.)

3. **Petitioner's Complaint.** While the bank acknowledges that Weston's tax is facially neutral, it alleges that it suffers a disparate impact as compared with the two other banks in town. The background is this:

Citizens Bank is a local bank. The other two banks operating in Weston (though they too began as local

banks) are now branches of large multi-city banking houses. It is admitted that some sorts of loans and investments that come into the branch banks are routed (described as "shipped out") to their home offices or affiliated companies, and subsequently remain there. The City cannot tax revenues from that business because it is done elsewhere; municipal B&O taxes can reach only business that occurs within the city limits.

4. **The Litigation.** When the B&O tax was enacted by the Common Council of Weston, Citizens Bank declined to pay it and instituted a declaratory judgment action alleging, *inter alia*, that the tax was violative of the Equal Protection Clause. This was true, Citizens said, because it retained and conducted all of its business originating within Weston within its Weston office, thus subjecting 100 percent of that business to the tax, while the branch banks shipped off some of the business that came their way from Weston, coincidentally removing that portion from Weston's tax jurisdiction. (Presumably, of course, it could be taxed by its new situs jurisdiction.) This left the branch banks paying B&O tax only on the business that they actually handled within their Weston offices. This, Citizens Bank alleged, was an unequal, unconstitutional tax impact.

It would seem that if anyone were to grumble about this scenario, it would be the City of Weston. One might expect the city to complain that it ought to be able to tax business that in some sense originates within it. But such is not the case before us today, because the city has no jurisdiction to tax business done elsewhere. At the moment, it is Citizens Bank lamenting that the other guys seem to be getting a better break!

Citizens Bank has not yet filed a B&O tax return, so its projections about its disproportional tax liability are but conjecture at the present. Even so, the learned trial judge concluded that, if Citizens Bank faced a potentially larger tax burden, it was not because of some constitutional infirmity in the B&O ordinance or its application, but because it simply was doing more banking business within Weston. "Simply put," he wrote, Citizens Bank has "more" to tax (p. 18a of the Petition). The West Virginia Supreme Court of Appeals, in a unanimous decision, agreed that Weston's B&O tax was valid under state and federal law.

ARGUMENT:
REASONS FOR DENYING THE WRIT

I. THERE IS NO GOVERNMENTAL ACTION.

If Citizens Bank does end up paying proportionately more B&O tax than the branch banks, it is simply the result of Citizens' own choices as to what sorts of business, and how much of it, to do within the city limits of Weston. No governmental action, either in the ordinance itself, or its application or administration, affects any disparity. Thus, the Equal Protection Clause is not implicated.

This is demonstrated by the plain fact that there is nothing whatsoever to prevent Citizens Bank from placing itself in *exactly the same posture* as the branch banks. Citizens could arrange to move the same sorts of business to affiliates in other cities, or open an office directly outside the Weston city limits, or use its existing branch

in a neighboring small town to avoid the Weston B&O tax. Citizens simply has chosen not to do so.[1]

II. THE CASE IS NOT "RIPE."

The West Virginia courts considered a mix of state law issues about B&O taxes as well as state and federal equal protection questions in adjudging this lawsuit below. There were two other plaintiffs in the case besides the bank; their issues involved state law issues. Now, stripped to Citizens Bank alone and its federal equal protection question, the case is not ripe for adjudication in the Supreme Court of the United States. And it would be rash to establish national tax policy upon such shifting sand.

It is the Respondent's position that the case is not ripe because Citizens Bank has never yet filed a B&O tax return with the City of Weston. It has refused to pay one cent of B&O tax. Accordingly, the city has no way of knowing what the bank's tax liability might be, or how its tax liability relates to that of the branch banks. The only evidence on this point presented in the West Virginia courts, for purposes of the Declaratory Judgment sought by Citizens Bank, was a set of self-serving estimates prepared by Citizens Bank. These estimates were formulated for this litigation by Citizens using its own, private figures and defining its own terms such as "banking

---

[1] It is noted that Citizens Bank has a branch in the Town of Jane Lew, some five miles distant from Weston (transcript p. 127). Any business that Citizens elects to do there will not be taxable by Weston.

deposits" and "banking business." (See the bank's Petition at pp. 4, 6-7 in which Citizens asserts, according to its own estimate, that while it has about 50 percent of the banking business in Weston, it would be paying about 70 percent of the B&O tax on banking activities in the city.)

That this is acutely important is illustrated by the fact that in its Petition (p. 7) the bank explains that in the trial court this projected disparity was based upon the bank's showing that "it held 50% of the banking deposits in the City but paid 70% of the overall B&O tax burden on the banking class of business." Yet the B&O tax is *not a tax on deposits* or capital assets; it is strictly a tax on revenue! By its own words, then, the bank's projections compare apples against oranges.

In short, the facts have yet to be developed here. Once a return is filed, and a tax calculated, there may be no controversy here at all, or its parameters may be much different from those now perceived.

It is a venerable principle of our jurisprudence that courts are not to adjudicate upon conjectural facts, or to give prospective, advisory opinions based upon what *might* come to pass. There must be a real case and controversy; otherwise the matter is not "ripe" for adjudication. Nowhere is this more true than in establishing principles of constitutional law. This court has long declared that it will not rule upon a factual "hypothesis" or an "abstract question." *Liverpool, N. Y. & P. S. S. Co. v. Emigration Commissioners*, 113 U.S. 33, 39 (1885), or upon "speculation," *United Public Workers v. Mitchell*, 330 U.S. 75, 91

(1947). Neither will it "anticipate" a constitutional question in advance of the necessity of deciding it. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985).

The proper posture for litigation of this sort to be considered by the Supreme Court of the United States would be for the bank to file its return, have it evaluated by the city, and then – and only then – proceed to dispute the tax liability in the courts, based upon real world facts.

If the decision of the West Virginia Supreme Court of Appeals were to be reversed here, the implications for governmental taxation would be immense. The overworn aphorism about "Pandora's box" would be entirely apposite. Once Pandora decided to open the box, every sort of evil jumped out; only hope remained inside. Many local governments across America are like Weston today, beset by dreadful economic woes. They could be expected to face legions of lawsuits challenging local taxation by every business that faced a competitor with multiple business sites, and the spectre of "disparate impact" in local taxation would haunt mayors, aldermen and councils across the land. The implications for state and even federal taxation are myriad as well. Notwithstanding all other considerations, national tax policy should not be formulated through a case that is not in all respects fully ripe for judicial attention.

III. *WASHINGTON v. DAVIS* WAS APPROPRIATE.

One of the bank's assignments of error is that the West Virginia Supreme Court wrongfully relied upon *Washington v. Davis*, 426 U.S. 229 (1979) in formulating its decision. *Davis*, of course, held that disparate impact

alone, without proof of some sort of discriminatory purpose, could not establish an equal protection violation. It involved black police applicants who challenged certain types of tests for police positions on the ground that blacks did not score as well on the tests as other groups. The Court ruled against the black applicants because of the absence of any showing of discriminatory purpose. *Davis* should not have been utilized in the B&O tax case, the bank argues, because it did not involve taxation issues, but rather questions "far afield" from those involved here.

The West Virginia court's reference to *Davis* was appropriate. In doing so, the Court was saluting the principle that local government must have leeway in establishing local taxes. Under West Virginia law, a general presumption of validity accompanies a local tax ordinance, and the burden of proof is upon one who seeks to invalidate the tax. *Burnsville v. Kwik-Pic, Inc.*, 185 W.Va. 696, 408 S.E.2d 646 (1991). This principle has risen to the status of constitutional principle in the jurisprudence of this Court. In *New Orleans v. Dukes*, 472 U.S. 297 (1976) this Court said:

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . 772 U.S. at 303.

It is curious that the bank makes much of *Davis*. The courts below found absolutely nothing to suggest that the Weston Common Council had any discriminatory purpose in mind when it enacted the B&O tax. And, after all, *Davis* involved a claim of racial discrimination, one of the fundamental "suspect classifications" that is afforded the highest protection under equal protection law, and which requires "strict scrutiny" review. Taxation issues, however, are at the lower end of the equal protection spectrum. This Court repeatedly has stated that taxation and other economic issues are to be examined under the minimal "rational-basis" test. *Nordlinger v. Hahn*, 505 U.S. 1 (1992); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973). The Court recently declined to go beyond this "rational-basis" test by adopting more rigorous standards of scrutiny for general social and economic legislation. *Board of Trustees of the University of Alabama v. Garrett*, 121 S.Ct. 955 (2001).

IV. THE WEST VIRGINIA COURT PROPERLY INTERPRETED *ALLEGHENY-PITTSBURGH*.

The bank further argues that the West Virginia Supreme Court misunderstood the holding of this Court in *Allegheny-Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989). In that case, the Webster County, West Virginia, Assessor's practice of establishing assessments on recent purchase prices, while leaving assessments on neighboring properties at far lower values based on their purchase prices many years earlier, was found to violate the Equal Protection Clause.

The Court's ruling was based on a finding that the Assessor's practice was treating taxpayers *within the same class* differently. The Court went on to explain, however, that states were free to divide property into *different classes* and assign to each class a different tax rate, so long as the separations into different classifications are reasonable. Chief Justice Rehnquist stated:

> The States, of course, have broad powers to impose and collect taxes. A State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable . . . It might, for example, decide to tax property held by corporations, including appellants, at a different rate than property held by individuals . . . (i)f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, *there is no denial of the equal protection of the law.* (Emphasis added.) 488 U.S. at 344.

Citizens Bank and the branch banks are in the same class. Any disparity in the amount of B&O tax that each must pay is simply the result of its own actions and those of its customers. Citizens Bank is *free to choose what sorts of business* it wishes to conduct in the city, or to ship out of the city, or to decline altogether. Those choices, together with the volume of business that its customers bring to it, determine the amount of tax that it will owe. *No governmental action contributes to any difference in tax liability between or among the banks.*

Further, *Allegheny-Pittsburgh* involved disparate taxation of different tracts within one jurisdiction; our case

involves, on the one hand, business done in the jurisdiction versus, on the other hand, business done outside the jurisdiction, where the city has no power to tax.

V. *LONG ISLAND LIGHTING* DOES NOT CONFLICT

The bank also contends that the West Virginia Supreme Court's ruling conflicts with the Second Circuit's holding in *Long Island Lighting Company v. Town of Brookhaven*, 889 F.2d 428 (2nd Cir. 1989). However, the bank's brief grievously misinterprets the holding of that case.

The bank's Petition suggests that *Long Island* does away with any necessity of showing discriminatory purpose in order to establish an equal protection violation in tax assessment cases if the assessment method results in disparate treatment.

In fact, *Long Island* did *not* do away with the necessity of showing unlawful discriminatory intent. It simply distinguished *Washington v. Davis* as to how *proof* of intent is to be established. The case did state that in the context of real property assessments "evidence of the assessor's mental processes need not be proved." But the Court then went on to explain:

> The requisite unlawful intent follows from proof of a systematic overassessment over time of certain properties as compared to other similarly situated properties within the taxing district; indeed absent proof of such an inequitable impact of the assessor's methods, LILCO could not succeed on its equal protection claim. . . . Intentional discrimination also follows from evidence that the assessing authority repeatedly

applied greatly disparate assessment ratios to similarly situated properties in violation of state law. 889 F.2d at 432.

VI. ANYWAY, HOW COULD WE FIX IT?

That this is not an equal protection problem is demonstrated by the fact that it could not be "fixed," either by amending the tax ordinance or by changing some practice of the city government. The city certainly cannot, constitutionally, prohibit the branch banks from sending business elsewhere. The only way to eliminate the situation complained of by Citizens Bank would be to repeal the city tax on banking altogether, so long as there are branch banks in town. No matter how the ordinance might be rewritten, the city still would not be able to tax business done elsewhere.

VII. SUMMARY OF THE ARGUMENT.

This is a true story. I have a wonderful cousin. We are the same age, have the same education, hobbies, religion, the same number of children. We are both lawyers. Every April 15 we both write a check to the Internal Revenue Service. For years now his check has been in a much, much larger amount than mine. Why? I make my living primarily as a university professor and city attorney for a small city. He makes his as a very busy plaintiffs' lawyer. His choice, my choice. Is he denied equal protection of the laws because his tax bill is larger than mine? Of course not. He just does more taxable business.

So it is with Citizens Bank. If the bank chooses to perform more sorts of banking functions within the City

than do other banks, so be it. If the other banks choose to send some of their business elsewhere, so be it. Citizens Bank is free to do the same as a tax avoidance strategy. But Weston's B&O tax is applied equally and uniformly upon the only banking activity that it can tax – all that which occurs within the City.

CONCLUSION

For the foregoing reasons the writ should be denied and the judgment below affirmed.

Respectfully submitted,

MICHAEL CLAY SMITH*
MARGARET D. SMITH
SMITH & SMITH
518 Center Avenue
Weston, WV 26452
(304) 269-5847
*Counsel of Record